TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, ET AL., APPELLANTS,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1951.

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[fol. 1] STATEMENT UNDER RULE 234 OMITTED

[fol. 2]

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

ABRAHAM LEDERMAN as President of TEACHERS UNION OF THE CITY OF NEW YORK, Local 555 of the United Public Workers, IRVING ADLER, JACK BIGEL, JONAH E. CAPLAN, SYLVIA LOMBECK, EVELYN DREYFUS, KATE FEINBERG, GEORGE FRIEDLANDER, MARK FRIEDLANDER, EWART GUINIER, MARGARET HUDSON, EDITH JOELL, C. E. JOHANSEN, SYLVIA KAPLAN, JOSEPH KEHOE, HAROLD KING, SAMUEL KRIEGER, ABRAHAM LEDERMAN, PAULINE LEVINE, DAVID LIVINGSTON, HENRIETTA LOWENSTEIN, JACK MARSHALL, SEVERINA MARTINEZ, WILLIAM MICHAELSON, WILLIAM NEWMAN, PEARL PACHODA, ALBERT PEZZATI, MADELEINE PROVINZANO, LEONORA S. RATNER, DOROTHY RUBEIRO, MURIEL SCHLOSSBERG, EMMA SCHWEPPE, ALEX SIROTA, MARTA SPENCER, DOROTHY TATE, DAVE TIGER, EDITH TIGER, ALCOTT TYLER, CELIA LEWIS ZITRON, in behalf of themselves and others similarly situated, Plaintiffs,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant

NOTICE OF APPEAL TO THE APPELLATE DIVISION

Sirs:

Please take notice that the defendant hereby appeals to the Appellate Division of the Supreme Court, Second De-
[fol. 3] partment, from the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949, wherein it is, among other things, adjudged that the Feinberg Law is null, void and unconstitutional and the defendant appeals from each and every part of said judgment as well as from the whole thereof except so much of said judgment as dismisses the complaint as to all plaintiffs except Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel

Krieger, William Newman, Dave Tiger and Edith Tiger.

Dated: January 9, 1950.

Yours etc., John P. McGrath, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To: Pressman, Witt & Cammer, Esqs., Attorneys for Plaintiffs, 9 East 40 Street, New York City; Francis J. Sinnott Esq., Clerk of the County of Kings.

[fol. 4] In Supreme Court of New York

Judgment Appealed From—December 16, 1949

An order having been granted simultaneously herewith awarding judgment to the taxpayer plaintiffs named therein declaring that subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, and that subdivision 2 of section 3022 of the education law, added by the Feinberg Law, and that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949 pursuant to the Feinberg Law are null, void, and unconstitutional and enjoining and restraining the defendant, The Board of Education of the City of New York, from enforcing any of such provisions and from taking any action thereunder, and dismissing the complaint as to the other plaintiffs,

Now, on motion of Pressman, Witt & Cammer, attorneys for plaintiffs, it is

Adjudged and Decreed that the complaint be and the same hereby is dismissed as to all plaintiffs except Irving Adler, George Friedlander, Mark Friedlander, Marta [fol. 5] Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, hereby designated as plaintiffs, and it is further

Adjudged and Decreed that subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, and that subdivision 2 of section 3022 of the education law, added by the Feinberg Law and that section 254 of chapter XV-B

of the Rules of the Board of Regents adopted July 5, 1949, pursuant to the Feinberg Law are null, void and unconstitutional, and it is further

Adjudged and Decreed that the Board of Education of the City of New York be and the same hereby is enjoined and restrained from enforcing any of the provisions of subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, or any of the provisions of subdivision 2 of section 3022 of the education law, added by the Feinberg Law, or any of the provisions of section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949.

Enter, M. H., J. S. C.

Granted Dec. 16, 1949, Francis J. Sinnott, Clerk.
Filed Dec. 21, 1949.

[fol. 6] IN SUPREME COURT OF NEW YORK

ORDER GRANTING JUDGMENT—December 16, 1949

[Title Omitted]

The plaintiffs having moved for an order granting judgment on the pleadings in favor of plaintiffs and against the defendant for the relief demanded in the complaint on the ground that the answer fails to set forth a sufficient defense and said motion having regularly come on to be heard, and Pressman, Wift & Cammer, attorneys for plaintiffs, having appeared in support of said motion, and John P. McGrath, Corporation Counsel (Michael A. Castaldi, Assistant Corporation Counsel, of counsel), attorney for defendant, having appeared in opposition thereto, and after due deliberation,

[fol. 7] Now, on reading and filing the complaint verified September 9, 1949, the answer verified October 11, 1949, the notice of motion dated October 21, 1949, and upon filing the opinion of the Court dated December 14, 1949, it is

Ordered that said motion be and the same hereby is granted as to plaintiffs Irving Adler, George Friedlander,

Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, herein called the taxpayer plaintiffs, and it is further

Ordered that the motion is denied as to the other plaintiffs and as to such other plaintiffs, the complaint be and the same hereby is dismissed, and it is further

Ordered that the above-named taxpayer plaintiffs have judgment upon the pleadings that subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, and that subdivision 2 of section 3022 of the education law, added by the Feinberg Law and that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law, be declared null, void and unconstitutional and that The Board of Education of the City of New York be permanently enjoined from enforcing any of such provisions and from taking any action thereunder.

Enter, M. H., J. S. C.

Granted Dec. 16, 1949, Francis J. Sinnott, Clerk.

[fol. 8] SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

Sirs:

Please take notice upon the complaint, verified September 9, 1949, and the answer verified October 11, 1949 herein, the plaintiffs will move this Court at a Special Term, Part 1 thereof, to be held in and for the County of Kings, at the courthouse in the Municipal Building, Fulton and Joralemon Streets, Borough of Brooklyn, City of New York, on the 28th day of October 1949 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting judgment on the pleadings in favor of the plaintiffs and against the defendant for the relief demanded in the complaint herein on the ground that the answer fails to set forth a sufficient de-

fense, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., October 21, 1949.

Yours, etc., Pressman, Witt & Cammer, Attorneys for Plaintiffs, 9 East 40th Street, New York, New York.

[fol. 9] To: John P. McGrath, Corporation Counsel, Attorney for Defendant, Municipal Building, New York, New York.

SUPREME COURT OF NEW YORK

COMPLAINT

Plaintiffs, complaining of defendant, by Pressman, Witt & Cammer, their attorneys, respectfully allege:

I. Teachers Union of the City of New York, Local 555 of the United Public Workers, is a voluntary labor organization of teachers employed in public and private schools in and about the City of New York, and Abraham Lederman is the President thereof. The purposes for which the Union is organized are (1) to increase educational opportunities for the people of New York, (2) to protect and advance the interests of educational employees in public and private institutions, (3) to develop the democratic character of education, and (4) to give teachers as a body a more effective voice in public affairs. The Union sues in behalf of itself and of its members.

[fol. 10] II. Plaintiff Abraham Lederman is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to the Department of Mathematics at Junior High School 64, Manhattan; plaintiff Emma Schweppe is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to Hunter College High School; Harold King is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools

of the City of New York, being now assigned at Textile High School; plaintiff Leonora S. Ratner is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to the Department of French, at Mark Twain Junior High School; Celia Lewis Zitron is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to the Department of Latin at Washington Irving High School. Each of such plaintiffs has tenure in the public school system within the meaning of the education law of the City of New York:

III. Plaintiff Irving Adler is a citizen of the United States and of the State of New York and is a resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand ($1,000.) Dollars located at 36-12 Corporal Kennedy Drive, Bayside, Queens, New York, and is and for several years last past [fol. 11] has been a regular teacher in the public schools of the City of New York, being now Chairman of the Mathematics Department of Textile High School; plaintiff George Friedlander is a citizen of the United States and of the State of New York and is a resident of the City of New York and is the co-owner with plaintiff Mark Friedlander and is liable to pay taxes on, realty assessed for more than One Thousand ($1,000.) Dollars at 4303 Skillman Avenue, Long Island City, Queens, New York, and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now Chairman of the Speech Department of Washington Irving High School; plaintiff Mark Friedlander is a citizen of the United States and of the State of New York and is a resident of the City of New York and is the co-owner with plaintiff George Friedlander of, and is liable to pay taxes on, realty assessed for more than One Thousand ($1,000.) Dollars at 4303 Skillman Avenue, Long Island City, Queens, New York, and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now a teacher in Manhattan High School of Aviation Trades; plaintiff Marta Spencer is a citizen of the United States and of the State of New York and is a

resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand ($1,000.) Dollars located at 31-40 76th Street, Jackson Heights, Queens, New York, and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now a teacher in P. S. 48, Queens, New York. Each of such plaintiffs has tenure in the public school system within the meaning of [fol. 12] the education law of the City of New York.

IV. Plaintiff Samuel Krieger is a citizen of the United States and of the State of New York and is a resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand ($1,000.) Dollars located at 96-18 72nd Avenue, Forest Hills, Queens, within the City of New York, and is a business man; plaintiff William Newman is a citizen of the United States and of the State of New York and is a resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand ($1,000.) Dollars located at 4422 Bedford Avenue, Brooklyn, within the City of New York, and is a business man.

V. Plaintiffs Dave Tiger and Edith Tiger are citizens of the United States and of the State of New York and are residents of the City of New York, and are co-owners and are liable to pay taxes on realty assessed for more than One Thousand ($1,000.) Dollars located at 233 Exeter Street, Brooklyn, within the City of New York, and are the parents of a child attending the schools of the City of New York.

VI. Plaintiff Jack Marshall resides at 4329 Broadway, New York City, and is treasurer of the Parent-Teachers Association of P. S. 132 in Manhattan; plaintiff Jack Bigel is president of the New York District of United Public Workers of America; plaintiff Pauline Levine resides at 350 Madison Street, New York City, and is vice-president of the Parent-Teachers Association of P. S. 147 in Manhat- [fol. 13] tan; plaintiff Sylvia Dombeck resides at 3152 Brighton 6th Street, Brooklyn and is President of the Parent-Teachers Association of P. S. 253 in Brooklyn; plaintiff Kate Feinberg resides at 1511 Boston Road, Bronx, and is president of the Parent-Teachers Association of P. S. 61 in the Bronx; plaintiff Henrietta Lowenstein

resides at 1505 Boston Road, Bronx and is treasurer of the Parent-Teachers Association of P. S. 61 in the Bronx; plaintiff Sylvia Kaplan resides at 1685 Boston Road, Bronx, and is a delegate of United Parents Association of the Parent-Teachers Association of P. S. 61 in the Bronx; plaintiff Pearl Pachoda resides at 663 Crotona Park North, Bronx, and is president of the Parent-Teachers Association of P. S. 92 in the Bronx; plaintiff Evelyn Dreyfus resides at 616 East 158th Street, Bronx, and is president of the Parent-Teachers Association of P. S. 51 in the Bronx; plaintiff Dorothy Rubeiro resides at 1421 Prospect Avenue, Bronx, and is president of the Parent-Teachers Association of P. S. 54 in the Bronx; plaintiff Margaret Hudson resides at 1416 Prospect Avenue and is president of the Parent-Teachers Association of P. S. 40 in the Bronx; plaintiff Madeleine Provinzano resides at 201 Wadsworth Avenue and is recording secretary of the Parent-Teachers Association of P. S. 132 in Manhattan; plaintiff Edith Joell resides at 121 West 116th Street; plaintiff Muriel Schlossberg resides at 1121 Beach 24th Street, Far Rockaway, Queens. Each of said plaintiffs is the parent of a child or children attending the public schools of the City of New York and each of such plaintiffs is a citizen of the United States and of the State of New York and a resident of the City of New York.

[fol. 14] VII. Plaintiff Joseph Kehoe is secretary-treasurer of the American Communications Association; plaintiff Severina Martinez is regional director of the Food, Tobacco, Agricultural and Allied Workers of America; plaintiff Alcott Tyler is business manager of Local 121; plaintiff C. E. Johansen is the New York agent of the Marine, Cooks and Stewards Union; plaintiff Albert Pezzati is a member of the International Executive Board and the regional director of the International Union of Mine, Mill and Smelter Workers; plaintiff William Michaelson is president of Local 2 Department Store Union; plaintiff David Livingston is director of organization of the Wholesale and Warehouse Workers Union, Local 65; plaintiff Ewart Guinier is national secretary-treasurer of the United Public Workers of America; plaintiff Alex Sirota is president of District 3, United Furniture Workers of America and manager of Local 140 thereof; plaintiff Dorothy Tate

is a social worker; plaintiff Jonah E. Caplan is a rabbi and is president of the Long Island Division of the American Jewish Congress. Each of such plaintiffs is a citizen of the United States and of the State of New York and a resident of the City of New York.

VIII. Plaintiffs bring this action in behalf of themselves and others similarly situated.

IX. Defendant, The Board of Education of the City of New York, is the body corporate organized pursuant to the Education Law of the State of New York which is required to conduct and administer the public school system of the City of New York.

[fol. 15] X. The people of the State and City of New York have expended and continue to expend large sums of money for the establishment of a system of free public education whereby students shall receive education from competent and alert teachers who are free to teach their subjects to the best of their conscience, knowledge and ability without intimidation, without fear, and without interference with freedom of speech, press, assembly, self-association and other basic rights guaranteed against restraint or abridgment by the State and Federal Constitutions.

XI. The free public school system and civil service provisions of the Constitution of the State of New York contemplates as essentials thereof that there be full encouragement for free inquiry for teacher and student; that the sole relevant test of merit and fitness of the teacher be his professional performance and acts related to such performance; that the political, social, economic and religious views, opinions and associations of the teacher be his personal concern; and that the teacher be guaranteed tenure, with dismissal confined to specified causes and only after full hearings, opportunity for self-defense and judicial reviews to the end that the full benefit of the teacher's training and experience be utilized for the benefit of the schools.

XII. On March 31, 1949, the Governor of the State of New York approved Chapter 360, laws of 1949, being "an act to amend the education law, in relation to eliminating from the public schools, superintendents, teachers and employees who are members of subversive organizations"

[fol. 16] and which is commonly known as the Feinberg Law.

XIII. The Feinberg Law purports to implement and to apply sections 12-a of the civil service law and 3021 of the education law as follows:

First, it contains a legislative finding and declaration of the alleged necessity therefor;

Second, by subdivision 1 thereof, it adds a new section 3022, to the education law to direct the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system by section 12-a of the civil service law and section 3021 of the education law;

Third, subdivision 2 thereof directs the Board of Regents, "after inquiry, and after such notice and hearing as may be appropriate, (to) make a listing of organizations which it finds to be subversive" within the meaning of said section 12-a; that this listing may be amended or revised from time to time; that in making its inquiry the board may utilize "any similar listings or designations" by federal authorities and request and receive from them supporting evidence and material; that it may provide that membership in an organization so listed "shall constitute prima facie evidence of disqualification for appointment to or retention in" employment in any office or position in the public schools.

Fourth, subdivision 3 of such section directs annual reports from the board to the legislature on the subject.

[fol. 17] XIV. On July 15, 1949, in pursuance of the provisions of the Feinberg Law, the Board of Regents adopted rules numbered XV-B entitled "Subversive Activities" (herein called the Rules) and has distributed the Rules with an accompanying memorandum by the Commissioner of Education on certain administrative phases thereof to the defendant and to other administrative agencies concerned with the public schools for their instruction and guidance. A copy of the Rules, the Commissioner's memo-

randum, the provisions of the Feinberg Law and of section 12-a of the civil service law is annexed as Exhibit A.

XV. The Board of Regents has further announced that it will on September 15, 1949, promulgate and publish its list of proscribed "subversive" organizations. However, it has not served charges of subversiveness against any organization or conducted any hearings at which evidence has been taken or the rights of confrontation, cross-examination, to be represented by counsel, to be heard on any charges has been held or accorded, and upon information and belief, it does not intend between now and the promulgation and publication of such list to prefer such charges or to accord such a hearing to any organization which it intends thus to list.

XVI. The Board of Regents in promulgating and publishing such list of proscribed "subversive" organizations, without charges, notice or hearing as aforesaid, intends to convey to the defendant, to all present and prospective teachers and to the people of the State the knowledge that an authoritative determination, binding and conclusive [fol. 18] upon them, in accordance with lawful authority and in consonance with due process of law, with respect to the status, rights and character of such organization has been made.

XVII. Upon information and belief the defendant intends and threatens, and has taken steps immediately to effectuate the provisions of the Feinberg Law and of section 12-a of the civil service law as applied and supplemented by the Feinberg Law and in accordance with the Rules and accompanying memorandum of the Commissioner of Education and to allocate and expend public funds for that purpose. The defendant has assigned a committee for this purpose and intends and threatens to adopt and accept the listing of alleged proscribed "subversive" organizations to be published on September 15 as binding and conclusive not only as to it but as to all teachers and employees of the public schools, and to prospective teachers and others, and to put into effect the procedures for loyalty reports on teachers provided by the Rules, with the consequent spying, snooping, gossip-mongering and concomitant and inevitable fear, repression and demoralization among the teachers and other employees in the pub-

lic schools of the City which will thereby be entailed. The said imminent and threatened activities of the defendant and the expenditures and costs which they will entail are illegal as are set out hereafter.

XVIII. The Feinberg Law on its face and section 12-a of the civil service law as applied and supplemented by the Feinberg Law, subject all present employees of the Board of Education, including those plaintiffs who are teach-
[fol. 19] ers, to various rules, regulations and procedures which are in violation of the rights, property and liberties guaranteed against abridgment by the Federal and State Constitutions, as more fully hereafter set out.

XIX. The Feinberg Law, on its face, and section 12-a of the civil service law as construed and applied by the Feinberg Law, subject all persons, including all of the plaintiffs, to various sanctions, disabilities and penalties in violation of rights, property and liberties guaranteed against abridgment by the Federal and State Constitutions, as more fully hereafter set forth.

XX. The Rules and the accompanying memorandum of the Commissioner of Education and the Feinberg Law as construed and applied by the Rules and accompanying memorandum subject all present employees of the Board of Education, including those plaintiffs who are teachers, to various rules, regulations and procedures which are in violation of the rights, property and liberties guaranteed against abridgment by the Federal and State constitutions, as more fully set forth hereafter.

XXI. The rules and the accompanying memorandum of the Commissioner of Education and the Feinberg Law as construed and applied by the Rules and the accompanying memorandum subject all persons, including all of the plaintiffs, to various sanctions, penalties and disabilities, in violation of rights, property and liberties guaranteed against abridgment by the federal and state constitutions, as more fully hereafter set forth.

[fol. 20] XXII. The Feinberg Law is void, illegal and unconstitutional on its face for the following reasons:

1. It imposes thought control and fascist-patterned conformity upon the people and suppresses freedom, liberty and independence in that it purports to confer

upon an agency of government the power to proscribe organizations to which the people may not belong, under pain of punishment, on the basis merely of the teaching and advocacy of political, social and economic ideas, views and opinions, in violation of the powers reserved to the people by Amendments IX and X of the Constitution of the United States and guaranteed against restraint or abridgment by Article I of the Constitution of the State of New York and Amendment I of the Constitution of the United States.

2. It purports to confer upon an executive agency of government the power to determine the nature, character, rights and status of an organization to which the people may not belong under penalty of punishment on the basis merely of the teaching and advocacy of political, social and economic ideas, views and opinions, in violation of the powers reserved to the people by Amendments IX and X of the Constitution of the United States and guaranteed against restraint or abridgment by Article I of the Constitution of the State of New York and Amendment I of the Constitution of the United States.

3. It purports to confer upon an executive agency of government the power to make a binding and con- [fol. 21] clusive determination concerning the nature, rights, character or status of an organization to which the people may not belong under penalty of punishment without due process of law in violation of Article I, section 1 of the Constitution of the State of New York and Amendment XIV of the Constitution of the United States.

4. It purports to confer upon an executive agency of government the power, under vague and indefinite standards which may be fixed by the enforcement officials, to determine the "subversiveness" of political, social and economic ideas, views, expressions, writings and opinions unrelated to acts or conduct, as well as the "subversive" character of organizations to which the people may not belong under penalty of punishment and to prescribe orthodoxy in violation of Article I, section 1 of the Constitution of the State of

New York and Amendment XIV of the Constitution of the United States.

5. It is repugnant to Article I, section 10 of the Constitution of the United States, in that it constitutes a bill of attainder by making findings of fact and conclusions of law by legislative fiat against certain organizations as being "subversive" and therefore illegal.

XXIII. The Feinberg Law on its face (in addition to the reasons set forth in paragraph XXII) and section 12-a of the civil service law as applied and supplemented by the Feinberg Law are void, illegal and unconstitutional for the [fol. 22] following reasons:

1. They impose a prior restraint upon and therefore abrogate the right of freedom of speech and press guaranteed against restraint or abridgment to the people of New York including plaintiffs by Article I, section 8, of the Constitution of the State of New York and by Amendments I and XIV to the Constitution of the United State in that they punish by disqualification from public employment expressions of a political, economic and social character defined by said Act and considered by the enforcement agents of said Act to be subversive.

2. They impose a prior restraint upon and therefore abrogate the right of freedom of assembly and association guaranteed against restraint or abridgment to the people of New York, including plaintiffs, by Article I, section 9, of the Constitution of the State of New York and by Amendments I and XIV to the Constitution of the United States in that they punish by disqualification from public employment mere assembly and association with organizations teaching and advocating expressions of a political, social and economic character defined thereby and considered by the enforcement agents of said Act to be subversive.

3. They deny to all the people of the State, including plaintiffs, due process of law in violation of Article I, section 1, of the Constitution of the State of New York and Amendment XIV to the Constitution of the United [fol. 23] States in that they are vague and indefinite

and fail generally to specify with sufficient precision what illegal conduct will render persons liable to the penalties prescribed thereby.

4. They are repugnant to Amendments I and XIV of the Constitution of the United States because they subject the people of the State of New York, including plaintiffs, to loss of property, rights and liberties by the mere act of association with other persons or by membership in certain organizations or groups considered by the enforcement agencies to be subversive.

5. They violate Article V, section 6 of the Constitution of the State of New York by prescribing standards other than merit and fitness as a condition for public employment.

6. They violate Article V, section 6, of the Constitution of the State of New York by establishing subjective tests of merit and fitness as conditions of employment by teachers and prospective teachers.

7. They violate and restrict the inalienable right of the people reserved by Amendments IX and X to the Constitution of the United States to reform their government and to teach and advocate such reform.

8. They violate Article I, section 1 of the Constitution of the State of New York by destroying the system of free public schools prescribed thereby, and by imposing thought control and prescribing orthodoxy in thinking, expression, writing and association for [fol. 24] the people of the State of New York, and especially upon teachers, prospective teachers and children now and hereafter attending the schools, and by imposing a despotism of ideas, views and opinions.

XXIV. The Rules and the accompanying memorandum of the Commissioner of Education are void, illegal and unconstitutional for each of the reasons set forth in paragraphs XXII and XXIII and are in violation of Article I of the Constitution of the State of New York and Amendment XIV of the Constitution of the United States, and for the additional reasons that

1. They are ex post facto in operation and make punitive acts, conduct, ideas and associations which

were legal prior thereto and are retroactively rendered punitive.

2. They are designed to create a sham appearance of due process of law by the euphemistic provision "that in all cases all rights to a fair trial, representation by counsel and appeal or court review * * * shall be scrupulously observed", whereas in truth, fact and intent the Regents intend by the promulgation of the Rules and the Commissioner of Education intends by the promulgation of the accompanying memorandum to convey to the administrative officers and agencies to whom they are addressed, including the defendant, the knowledge that the Regents' determination of the subversiveness of an organization is authoritative, binding and conclusive as to defendant and other administrative officers and agencies to whom they are addressed, including the defendant, the knowledge [fol. 25] that the Regents' determination of the subversiveness of an organization is authoritative, binding and conclusive as to defendant and other administrative officers and agencies and upon all teachers and prospective teachers; that it has been made with lawful authority and in consonance with due process of law; and that such determination is and will be binding, when in fact this critical determination, concerning the status, rights and character of such organization under the Rules as well as under the Feinberg Law, may and will be made without due process, without notice of hearing, ex parte, without evidence, confrontation, benefit of counsel, cross-examination or any of the other fundamental and elemental essentials of due process of law.

3. They provide for a presumption of guilt rather than innocence and adopt and advance the doctrine of guilt by association.

4. They specify that ideas, expressions, views and associations, as distinguished from acts and conduct, are or may constitute subversive activity and are punishable.

5. They extend the statutory proscription against advocacy of force and violence to advocacy of any change in our government and limit the rights of

teachers to allow them only to raise questions and make suggestions about improvements in our form of government "outside their classrooms", and to "inform themselves fully, and enter into discussions with people, about forms of government different from our own."

[fol. 26] XXV. In the discharge of their duties of citizenship and in the exercise of their constitutional rights of freedom of speech, press, assembly and petition, and for the aid, protection, security, improvement and betterment of their status, the people, including plaintiffs, and particularly teachers, (1) have the right, subject to the competent and proper performance of their assigned duties and (2) have the obligation in order competently and properly to perform such duties, to espouse, advocate, teach and urge any and all political, social, and economic views, ideas, and opinions as their minds, conscience, training, experience and learning dictate so long as they engage in no unlawful acts.

XXVI. The enactment of the Feinberg Law and the promulgation by the Board of Regents of the Rules and by the Commissioner of Education of the accompanying memorandum demoralize the school system of the City, stifle academic freedom, discourage those who value independence from entering the teaching profession, invite a reign of intimidation and repression, impose upon teachers a frightened self-censorship on the discussion of the mildest form of social, political and economic reform and a resulting censorship upon the right of pupils and students freely to receive the benefit of diverse and controversial ideas, views and opinions, and, unless stamped as unconstitutional, void and illegal, threatens to leave the cruel imprint of bigotry, dictatorial thought control and single moldedness upon school children, destroying the possibility of free and untrammeled critical inquiry, intellectual curiosity and freedom without which education is barren and the schools mere buildings.

[fol. 27] XXVII. The threatened and imminent acts of defendant described above, based upon the Feinberg Law and the Rules and accompanying memorandum promulgated thereunder will intensify the injury resulting from

the enactment of the Feinberg Law described in paragraph XXVI and the promulgation of the Rules and accompanying memorandum and will cause further substantial waste of public funds, irreparable injury to the public schools of the City of New York and to the liberty and property of plaintiffs and such threatened and imminent acts are unconstitutional void and illegal.

XXVIII. The threatened and imminent acts of defendant described above, based upon the Feinberg Law and the Rules and accompanying memorandum promulgated thereunder will require supervisory employees of the defendant, including those of the plaintiffs who occupy supervisory positions in the public schools, to engage in unlawful extra-educational prying and inquiry into the political, social and economic views and associations of their subordinates for the assessment, appraisal and determination of the "subversiveness" thereof in order to comply with the at least annual reporting requirements of the Feinberg Law, the Rules and accompanying memorandum, and will involve substantial cost in time, supplies and material therefor and disruption and interference with the educational administrative duties of such employees and of the defendant, its officers and agents.

XXIX. The mere preferment of charges against any teacher under the Feinberg Law, including the plaintiff [fol. 28] teachers or any member of a Union, in the face of the denial under the prescribed rules and procedures, of any right or opportunity to defend on the critical issue of the character, status and rights of an organization listed as subversive is tantamount to conviction and equivalent to criminal stigmatization and would result in disqualification from not only public, but from private employment as well, would result in social ostracism and economic isolation and would constitute irreparable injury and hardship to such teachers which would not be remediable by any action at law and will intensify the fear and repression generated by the enactment of the Feinberg Law with consequent further injury to the school system.

XXX. Plaintiffs, especially those who are teachers and prospective teachers, have and will have no administrative remedy since the defendant holds that it must and will

administer the Feinberg Law as written and as applied by the Rules and accompanying memorandum and, further, that the designation of any organization by the Regents is final and conclusive with respect to the status, character and right of such organization not only as to such organization but as to its members and all teachers and prospective teachers as well.

XXXI. Greater injury would be caused to plaintiffs by the denial of the relief here prayed for than would be caused to defendant by the granting thereof.

XXXII. Plaintiffs have no adequate remedy at law.

[fol. 29] Wherefore, plaintiffs demand judgment:

1. That the Feinberg Law on its face and as construed and applied by the Rules and accompanying memorandum be declared unconstitutional;

2. That section 12-a of the civil service law, as implemented and applied by the Feinberg Law be declared unconstitutional;

3. That the Rules and accompanying memorandum on their face be declared unconstitutional.

4. That defendant, its officers, members, attorneys and agents be enjoined from expending any funds or taking any action on the basis of or pursuant to the Feinberg Law, section 12-a as implemented and applied by the Feinberg Law, or the Rules or accompanying memorandum;

5. That pending the trial hereof a temporary restraining order issue to restrain any action or expenditure of funds by defendant on the basis of or pursuant to the Feinberg Law, section 12-a as implemented and applied by the Feinberg Law or the Rules or accompanying memorandum;

6. That plaintiffs have such other and further relief as may be just and proper.

Dated, New York, September 9, 1949.

Pressman, Witt & Cammer, Attorneys for Plaintiffs, Office & P. O. Address, 9 East 40th Street, New York 16, New York.

(Verified by Abraham Lederman on September 9, 1949.)

[fol. 30] EXHIBIT A, ANNEXED TO COMPLAINT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

REGENTS RULES

ON

SUBVERSIVE ACTIVITIES

THE UNIVERSITY OF THE STATE OF NEW YORK

REGENTS OF THE UNIVERSITY

With years when terms expire

1957 William J. Wallin A.M., LL.D., *Chancellor*, Yonkers.
1952 John P. Myers A.B., D.Sc., *Vice Chancellor*, Plattsburg.
1951 Wm. Leland Thompson A.B., LL.D., Troy.
1954 George Hopkins Bond Ph.M., LL.B., LL.D., Syracuse.
1953 W. Kingsland Macy A.B., LL.D., Islip.
1958 Edward R. Eastman LL.D., Freeville.
1960 Welles V. Moot A.B., LL.B., Buffalo.
1950 Mrs. Caroline Werner Gannett L.H.D., LL.D., Rochester.
1959 Roger W. Straus Litt.B., L.H.D., D.H.L., New York.
1955 George L. Hinman A.B., LL.B., Binghamton.
1961 Dominick F. Maurillo A.B., M.D., Brooklyn.
1956 John F. Brosnan A.M., LL.B., J.D., LL.D., New York.
1962 Jacob L. Holtzmann LL.B., LL.D., Brooklyn.

President of the University and Commissioner of Education

Francis T. Spaulding A.M., Ed.D., LL.D., Litt.D.

Deputy Commissioner

Lewis A. Wilson D.Sc., LL.D.

[fol. 31] *Associate Commissioner (Higher and Professional Education)*

Algo D. Henderson LL.B., M.B.A., LL.D.

Associate Commissioner (Institutes of Applied Arts and Sciences, Adult Education)
Lawrence L. Jarvie A.M., Ph.D.
Associate Commissioner (Elementary and Secondary Education)
Harry V. Gilson A.M., D.Sc. in Ed.
Counsel
Charles A. Brind Jr A.B., LL.B., LL.D.
Executive Assistant to the Commissioner
James E. Allen Jr Ed.M., Ed.D.

Chapter 360 of the Laws of 1949 requires the Board of Regents to "adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law." The sections of the law here cited define certain types of subversive activity, and make mandatory the dismissal of school officials, teachers, or other employes who engage in such activity.

This pamphlet sets forth the Rules adopted by the Regents on July 15, 1949, in accordance with the detailed provisions of the statute. It presents also a memorandum by the Commissioner of Education on certain administrative phases of the Rules, together with the full text of Chapter 360 of the Laws of 1949, Section 3021 of the Education Law, [fol. 32] and section 12-a of the Civil Service Law.

Inquiries with respect to the administration of the Regents' Rules should be addressed to the Commissioner of Education, State Education Department, Albany 1, New York.

RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

CHAPTER XV-B

SUBVERSIVE ACTIVITIES

SECTION 254 *Disqualification or removal of superintendents, teachers and other employes.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board [fol. 33] of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or

other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision *b* of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision *b* of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the [fol. 34] evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision *d* of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent

[fol. 35] to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed [fol. 36] under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or reten-

tion in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

5. This section shall take effect immediately.

[fol. 37] COMMISSIONER'S MEMORANDUM

ON

ADMINISTRATION OF REGENTS' RULES

RELATING TO SUBVERSIVE ACTIVITIES

Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employes as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect simply of directing attention to a special supervisory need—namely, the need "to protect the children in our state from * * * subversive influence"—which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need.

The Rules established by the Regents in response to the direction of the Legislature are largely self-explanatory. The Rules provide systematic procedures for identifying and removing from the school system disloyal teachers or other employes.

On four major points certain supplementary comments may be appropriate. These points are (1) the responsibility of the officials designated by school authorities for reporting on teachers and other employees, (2) the types of conduct which may properly be considered by school authorities as subversive within the meaning of section 3021 of the Education Law and section 12-a of the Civil Service [fol. 38] Law, (3) the rights of a person accused of subversive activity to a hearing on charges, and (4) the list-

ing of organizations found by the Regents to be subversive within the meaning of the law.

1. *Reports by school officials.* The officials designated by school authorities to report on teachers and other employes will face a two-fold duty. It will be their responsibility, on the one hand, to help the school authorities rid the school system of persons who "use their office or position to advocate and teach subversive doctrines." On the other hand, it will be their responsibility so to conduct themselves and their inquiries as to protect and reassure teachers who are not subversive.

School authorities will need to select with great care the officials who are to be entrusted with this duty.* The officials chosen should be persons of wide acquaintance within the school system, sound judgment in matters of personal relationships, and sufficient maturity and professional experience to have won the respect of the other local officials, teachers and school employes and of the general public. Furthermore, these officials must be close enough to the work of the classroom teacher so that they will have a real understanding of the methods of presentation that [fol. 39] may make the difference between teaching which is subversive in intent and teaching which has neither a subversive purpose nor subversive results.

In preparing the reports which they are to render to the school authorities, the designated officials will of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence. In weighing such further evidence the officials should be guided by the considerations presented

* School authorities in districts employing fewer than eight teachers will ordinarily find it advantageous to designate one or more of their own number as the official or officials to make the required reports. When there is only a single trustee in such a district, he or she will presumably make all the reports required by the Regents' Rules.

in section 2 of this memorandum. Any evidence submitted to such officials which reflects adversely on a teacher, they are bound to examine promptly, dispassionately and thoroughly.

The designated officials should bear in mind for their own guidance, and where appropriate should bring to the attention of others, the fact that while statements made in connection with an official charge of disloyalty are legally privileged, no privilege attaches to gossip and the circulation of rumor. In this latter connection attention is called to the *Matter of Mencher v. Chesney*, 297 N. Y. 94 (101) in which the Court of Appeals stated: "The courts have held that a false charge that one is a Communist is basis for a libel action."

2. *Subversive activity.* The Education Law and the Civil Service Law make it entirely clear that a teacher [fol. 40] or other employe who "wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means," or who participates in the preparation, publication or distribution of written or printed matter advocating such a doctrine or advising its adoption, or who "organizes or helps to organize or becomes a member of any society or groups of persons" which teaches or advocates such a doctrine, or who utters "any treasonable or seditious word or words" or does "any treasonable or seditious act or acts," is engaging in subversive activity and is subject to dismissal. It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subservise acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children.

It must be borne in mind that teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American

form of government and American institutions, which can not in any just sense be construed as subversive. Especially if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and for-
[fol. 41] eign governments (including the people and government of Russia), not for the purpose of advocating changes in our own government but for the purpose of acquainting their pupils with the kinds of government under which other people live.

Moreover, teachers who take full advantage of their own privileges as citizens may raise questions and make suggestions outside their classrooms, about improvements in our form of government. In addition, they may quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own.

School authorities and the officials designated in accordance with the Regents' Rules must be alert to guard such teachers against unjust accusation and condemnation. In particular, they should reject hearsay statements, or irresponsible and uncorroborated statements, about what a teacher has said or done, either in school or outside. They should examine an accused teacher's statement, writing or action in their context, and not in isolated fragments. They must insist on evidence, and not mere opinion, as a basis for any action which they may take.

But the statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case.

[fol. 42] 3. *The preferring of charges.* Neither section 12-a of the Civil Service Law nor section 3021 of the Education Law nor Chapter 360 of the Laws of 1949 modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record

must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal.

4. *List of subversive organizations.* The Regents have not as yet published a list of organizations which, in accordance with Chapter 360 of the Laws of 1947, they have found to be subversive in that the said organizations "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine." Due notice will be given to school authorities of the publication of the required list. Pending its publication, school authorities are responsible for proceeding with all diligence in the cases of teachers whose acts other than membership in specified organizations fall within the purview of the stat-
[fol. 43] utes. They are not responsible until the list is published, for proceeding against teachers on the ground that they belong to any specified organization.

In the reports required as of October 31st, school authorities will be expected to indicate the measures which they have put into effect prior, as well as subsequent, to the publication of the Regents' list.

Francis T. Spaulding, Commissioner of Education.

CHAPTER 360, LAWS OF 1949

SECTION 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employ-

ment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position [fol. 44] to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

[fol. 45] § 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to reads as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employes in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article, or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine; as set forth in section twelve-a of the civil service law. Such [fol. 46] listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for ap-

pointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

3022. Elimination of subversive persons from the public school system.
3023. Liability of a board of education, trustee or trustees.
[fol. 47] 3024. Teachers responsible for record books.
3025. Verification of school register.

§ 5. This act shall take effect July first, nineteen hundred forty-nine.

EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college or any other state educational institution who: (a)

By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

[fol. 48] (b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

[fol. 49] SUPREME COURT OF NEW YORK

ANSWER

Defendant above named, answering the complaint herein, by John P. McGrath, Corporation Counsel, its attorney, alleges:

1. Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation in

Paragraph I thereof except as to the allegation that "The Union sues in behalf of itself and of its members". As to such allegation, defendant denies that Teachers Union of the City of New York, Local 555 of the United Public Workers, has any right to institute or maintain this action.

2. Answering the allegations in Paragraphs II and III thereof, defendant denies that the plaintiffs therein named, to wit, Abraham Lederman, Emma Schweppe, Harold King, Leonora S. Ratner, Celia Lewis Zitron, Irving Adler, George Friedlander, Mark Friedlander and Marta Spencer have any right to institute or maintain this action.

3. Answering the allegations in Paragraphs IV or VII thereof, defendant denies that the 29 plaintiffs named in the said paragraphs have any right to institute or maintain this action.

[fol. 50] 4. Answering the allegations in Paragraph VIII thereof, defendant denies that the plaintiffs have any right to institute or maintain this action on behalf of themselves or in behalf of others similarly situated.

5. Denies each and every allegation in paragraph X and XI thereof and alleges that the defendant is a public corporation and a city school district with such powers and duties as are prescribed by the Constitution and statutes of this State and by the rules and regulations of the Board of Regents and of the Commissioner of Education.

6. Denies the allegations in paragraphs XIII and XIV thereof, and refers to L. 1949, ch. 360, to Article XV-B of the Rules of the Board of Regents and to the memorandum of the Commissioner of Education for the text and legal effect thereof.

7. Admits the first sentence in paragraph XV thereof and denies each and every allegation in the balance of the said paragraph.

8. Denies each and every allegation in Paragraph XVI thereof and alleges that L. 1949, ch. 360 provides that membership in any organization listed by the Board of Regents shall be *prima facie* evidence of disqualification for employment in the public schools of the State, and refers to L. 1949, ch. 360 for the text and legal effect thereof.

[fol. 51] 9. Denies each and every allegation in Paragraphs XVIII, XIX, XX, XXI, XXII, XXIII, XXIV,

XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXII thereof.

10. Admits the allegations in the first sentence of paragraph "XVII" thereof except the words "and to allocate and expend public funds for that purpose" and except as thus admitted, it denies each and every allegation in the said paragraph.

Wherefore, the defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

John P. McGrath, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

(Verified by Morris Warschauer, Assistant Secretary of the Board of Education on October 11, 1949.)

[fol. 52] IN SUPREME COURT OF NEW YORK

OPINION OF HEARN, J.

(Vol. 122, New York Law Journal, Page 1653, December 15, 1949.)

HEARN, J.—This is an action for a permanent injunction and a judgment declaring unconstitutional chapter 360, Laws of 1949 (commonly known as the Feinberg Law) section 12-a of the Civil Service Law (as implemented by the Feinberg Law) and the Regents Rules and Commissioner's memorandum promulgated thereunder.

There are three motions before the court—one for a temporary injunction, another for leave to intervene as parties plaintiff and the third, by plaintiffs, for judgment on the pleadings. Since a decision on the third will dispose of all issues the court will consider it first.

The plaintiffs are a heterogeneous group. Among them are the Teachers Union, other unions, parents, parent-teacher associations, citizens, a social worker, the head of a religious group, teachers and taxpayers. The answer denies that any of them have the right to maintain this action.

There are only two groups of plaintiffs whose claim of a right to sue has substance—the teachers and the taxpayers.

As to the teachers, defendant says there is no justiciable controversy. No list has yet been promulgated by the Board of Regents—hence no teacher has been or can be accused of being a member of a listed subversive organization—in short, no one has been hurt. Plaintiff teachers, however, maintain that they are hurt by the very existence of the law on the books—that they are presently restrained in the exercise of their rights of free speech, free thought [fol. 53] and freedom of association because they fear the sanctions contained in the statute—and that "uncertainty, peril and insecurity result from imminent and immediate threats to asserted rights." They say they should be allowed to sue now; that they should not have to wait until a list has been promulgated and then show that by membership in a listed subversive organization they are aggrieved.

Were this an open question the court would be inclined to agree with plaintiffs. If they must violate the law to gain the right to challenge it they risk inevitable discharge from their positions. "To require these employees first to suffer the hardship of a discharge is not only to make them incur a penalty; it makes inadequate, if not wholly illusory, any legal remedy which they may have. Men who must sacrifice their means of livelihood in order to test their rights to their jobs must either pursue prolonged and expensive litigation as unemployed persons or pull up their roots, change their life careers and seek employment in other fields. At least to the average person in the lower income groups the burden of taking that course is irreparable injury" (United Public Workers v. Mitchell, 330 U. S. 75, dissent by Douglas, J.).

Cogent as this argument may be, the court nevertheless is bound by the ruling of the majority in the above-cited case—and that ruling was that there is no justiciable controversy in a case such as this until the law has first been violated. Accordingly plaintiff teachers have no right to now maintain this action.

[fol. 54] The right of the taxpayer plaintiffs presents a different proposition. Section 51 of the General Municipal Law permits a taxpayer to sue to prevent "any illegal act * * * or waste or injury to * * * property, funds or estate

of * * * a municipal corporation." Defendant comes within the scope of this section "in so far at least as to authorize an action by a taxpayer to prevent waste of the City's money" (Lewis v. Board of Education, 258 N. Y., 117).

The complaint, among other things, alleges that defendant intends and threatens "to allocate and expend public funds" to effectuate the Feinberg Law; that defendant's imminent acts will cause further substantial waste of public funds; and that enforcement of the law "will involve substantial cost in time, supplies and material." The answer denies these allegations but admits that defendant intends and threatens and has taken steps immediately to effectuate the law.

The court need not ignore common sense and everyday experience in appraising the leaded facts. It is self-evident —and defendant, in fact, does not dispute it—that under the law an elaborate system of investigation will be set up (see New York City Superintendent of Schools proposed order for enforcement of the Feinberg Law, New York Times, September 13, 1949). Moreover, should charges be preferred against any teachers extensive hearings necessarily will be held (see Regents' Rules on Subversive Activities, p. 12). The investigations and hearings will, of course, involve a liberal use of personnel time and consumption of material and supplies bought with public funds. It is worth noting in this connection that the Lusk Law (chap. 666 of the Law of 1921), which was similar in [Vol. 55] many respects, carried with it an appropriation for the enforcement expenses of the State Department of Education. It is fair to assume that the enforcement of the law here under consideration likewise will require the expenditure of public funds.

In view of the foregoing the court holds that plaintiff taxpayers have the right to sue. In any event it being vitally important to the public at large and the school system in particular that the real issue herein be speedily determined the court should not "pause to consider whether the question is presented in appropriate proceedings" (Matter of Kuhn v. Curran, 294 N. Y., 207).

Since there are no issues of fact raised by the pleadings the motion for judgment will be considered on the substantive legal issue involved.

The problem posed by these statutes has many facets. Yet essentially they raise but one basic question—How far may the state go in imposing restrictions or conditions on employment as teachers in the public schools?

In seeking the answer to this question it should be borne in mind that to impart the principles of democracy, freedom of thought and speech must be preserved in the school setting. The atmosphere must be one which encourages able independent men to enter the teaching profession. To develop good citizens teachers must give students the facts, help them to learn to think and urge them to reach their own conclusions. To so teach, the teacher must himself be free to think and speak. He must not be under threat of enforced conformity to rigid standards; he must be free of blind censorship; he must be open-minded to new ideas—even when they do not appear to be orthodox. [fol. 56] The heart of American education is independent thought. This was best stated in the charge of Judge Medina in the recent trial of United States v. Foster et al.: "I charge you that if the defendants did no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas, you must acquit them. For example, it is not unlawful to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence by the prosecution such as the Communist Manifesto, Foundations of Leninism and so on. Of course these books are to be found in public libraries and in the libraries of American universities. Indeed, many of our most outstanding and sincere educators have expressed the view that these theories should be widely studied and thoughtfully considered, so that all may thoroughly appreciate their significance and the inevitable effects of putting such theories into practice."

We must also recognize that both state and teacher have dual characters. The state is both employer and government—the teacher both employee and citizen. Hence, the state, like any employer, may impose a condition on employment that bear a reasonable relationship to the duties to be performed (Constitution of State of New York, Art. V, sec. 6). Such condition may be valid even though it impinges upon the basic constitutional right of free speech if it is essential to the integrity of the public service and

if the infringement is limited to the necessities of the situation.

But unlike a private employer the state is restricted to a considerable extent both as to the nature of the condition [fol. 57] imposed and the manner of its imposition. Thus it may not bar one from public employment because of race, religion or political affiliation (United Public Workers v. Mitchell, 330 U. S., 75, 100). Nor may it bar one from public employment, even though the reason be sound, if the method employed constitutes conviction and punishment without a judicial trial (United States v. Lovett, 328 U. S., 303). No more may the state bar teachers from the schools for even a highly desirable and necessary reason if the method employed violates "due process."

It is particularly needful that we reaffirm and re-emphasize this doctrine at this stage in our history. In this connection it would be well to ponder a passage from The Times of London, written more than a hundred years ago. It appears in "Ordeal by Planning," by John Jewkes:

"The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised, from grievances treated with ridicule, from powerless men oppressed with impunity, and overbearing men tolerated with complacence, springs the tyrannical useage which generations of wise and good men may hereafter perceive and lament and resist in vain. At present, common minds no more see a crushing tyranny in a trivial unfairness or a ludicrous indignity, than the eye uninformed by reason can discern the oak in the acorn, or the utter desolution of winter in the first autumnal fall. Hence the necessity of denouncing with unwearied and even troublesome perseverance a single act of oppression. Let it alone and it stands on record. The country has allowed it and when it is at last provoked to a late indignation it finds itself gagged with the record of its own ill compulsion."

[fol. 58] The court well knows that at the present time there are those who would launch a widespread attack on our institutions through the outward appearance of democratic process. They proceed by stealth and in disguise to destroy that which they appear to defend. But "historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming in-

terest which appeals to the feelings and distorts the judgment' (Holmes, J., in Northern Securities Co. v. United States, 193 U. S., 197, 400)," nor should they "change their form and content in response to the 'hydraulic pressure' (Holmes, J., supra) exerted by great causes."

There is yet another principle by which the court must be guided. A law which intrudes upon freedom of speech, thought or association comes into court bare of the usual presumption of validity because of "the preferred place given in our scheme" to these freedoms. And it is the character of the right, not of the limitation, which establishes what standard "shall be used in determining where the individual's freedom ends and the State's power begins" (Thomas v. Collins, 323 U. S., 516).

With these principles clearly in mind—cognizant always that every legal picture must have a moral frame—remembering that "the life of the law is not logic, but experience" (Oliver Wendell Holmes), let us examine the laws and rules here attacked.

It should be noted at the outset that the Feinberg Law is a new administrative statute implementing two older laws (Education Law 3021 and Civil Service Law 12-a). Its provisions merely establish procedures to facilitate en- [fol. 59] forcement of these two earlier statutes, they being substantive in nature.

Since its provisions refer to hearings and presumptions it may be well here to point out the rules relevant thereto.

Due process ordinarily requires "a fair and open hearing" with "not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" (Morgan v. U. S., 304 U. S., 1, 19).

Presumptions may be created by statute only if there is "some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate" (McFarland v. Am. Sugar Co., 241 U. S., 86).

What are these statutes and rules? What do they seek to accomplish? How do they operate?

The Feinberg Law provides, inter alia, that the Board of Regents shall promulgate a list of "subversive" organizations after inquiry and "such notice and hearing as may

be appropriate." The character and conduct of the hearing thus may be left to the unfettered discretion of the Regents. Under such provision it well may happen that an allegedly subversive organization, after appropriate notice to appear at a hearing, defaults and subsequently is listed by the Regents following an uncontested hearing. If it be assumed, as of course we may, that the Regents will properly enforce the law, such enforcement necessarily would be as follows: Adequate notice of a hearing is given to an organization; a full and proper hearing is had; but no member of the organization was in fact represented at the hear-[fol. 60] ing, such member not having been a party to the proceeding. After the hearing let us further assume that the organization is placed on the list of subversive organizations.

Should the organization or a member wish to challenge this listing it would seem that this could be done in a proceeding pursuant to article 78 of the Civil Practice Act. But in a comparable situation the courts have held that they will not review such administrative action because no justiciable controversy exists (Joint Anti-Fascist Refugee Committee v. Clark, 177 Fed., 2d, 79; Internat. Workers Order v. Clark, District Court for District of Columbia, McGuire, J., April 12, 1949; Nat. Council for Soviet Am. Friendship v. Clark, C. C. A., D. C., not yet reported). A teacher is then charged with membership in the listed organization. At such hearing the organization is deemed to be subversive within the definition of Civil Service Law 12-a even though the finding was by an administrative body and, as to the accused teacher, the supporting evidence was hearsay and he had no opportunity to meet it. In short—the listing, as to him, was ex parte.

Is there any reasonable connection under these circumstances between the fact supposedly "proved" and the fact presumed? Is it consonant with American traditions of fairness to base on so flimsy a foundation a presumption which establishes the major portion of the case against an accused and casts upon him the burden of disproving substantially what it took the government eleven months to establish in the recent trial in the United States District Court (Southern District) between Judge Medina in the case of United States v. Foster et al.?—

[fol. 61] But this presumption as to the character of the organization is not the only burden placed upon an accused teacher. The statute is ambiguous as to whether past as well as present membership is proscribed. Though the Regents' Rules interpret it as forbidding only present membership they create a presumption of continuance of past membership "in the absence of a showing that such membership has been terminated *in good faith.*" This rule well may be invalid under a constitutional ban on ex post facto legislation (see Calder v. Bull, 3 Dall., 386). Aside from this, however, it clearly places upon an accused teacher the oppressive burden of showing his innocence through affirmative proof of something as nebulous and intangible as "good faith"—and this in the face of the inevitable and justifiable skepticism which any realistic hearing officer must have as to the "good faith" of one accused of membership in a subversive organization.

There are yet other inequities in the procedure. A teacher found guilty by the Board of Education has a right of appeal. Education Law 310 gives the right to appeal to the State Commissioner of Education. Education Law, section 2523, gives an alternative right of appeal to the courts in an article 78 proceeding. Civil Service Law 12-a(d) provides for appeal to the courts where disqualification is pursuant to section 12-a. These three sections apparently overlap, and, to some extent, conflict with each other. In the present state of the law there is, to say the least, serious doubt as to whether any one of them exclusively controls and, if so, which—or whether they provide alternate remedies (see Matter of Nestler v. Board of Examiners, 192 Misc., 663). If the appeal is taken to the [fol. 62] Commissioner of Education (under Education Law 310), that section provides that his determination is *final* and cannot be reviewed by the courts. In such case it is possible that the Regents' listing of an organization and the teacher's disqualification thereunder would constitute conviction and punishment without a juricial trial. If the appeal be taken to the courts in an article 78 proceeding (under Education Law 2523) the court's review might well be "inadequate if not illusory" (Kirn v. Noyes, 262 App. Div. 581), since it is but a limited review on the record alone and the determination could be disturbed only if it had no warrant in the record, no reasonable basis in law

and was arbitrary or capricious. It has been the unfortunate tendency of our courts in recent years largely to abdicate their true functions and powers in proceedings to review the determination of administrative bodies, so that to-day "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (Matter of Park East Land Corp'n v. Finkelstein, 299 N. Y., 70, 75). Here too, then, for all practical purposes, the procedure might be tantamount to conviction and punishment without judicial trial.

The teacher seeking to appeal finds himself confronted with still another question: Can he appeal to the courts under Civil Service Law, section 12-a(d) where the disqualification was under the procedure established by the Feinberg Law? The Feinberg Law itself neither contains machinery for appeals nor refers to any other statute in that regard. However, it is part of the Education Law, as are sections 310 and 2523, previously referred to, and [fol. 63] these three sections deal exclusively with teachers and administrative personnel of the Department of Education. Civil Service Law 12-a, on the other hand, is a general statute applicable to all civil service employees of the state and city. It seems likely that the appeal statutes dealing specifically with teachers (Education Law 310 and 2523) would control the general statute dealing with all civil service employees (Civil Service Law 12-a) and consequently would bar the right of a teacher to come into court under section 12-a(d).

In short, a teacher discharged under the Feinberg Law would find himself on the horns of a dilemma. If he appeals to the commissioner of education he loses his recourse to the courts; if he starts an article 78 proceeding the court's review (on the record alone) is "inadequate if not illusory"; if he goes into court under Civil Service Law 12-a(d) he probably will be confronted with a court ruling that his proper remedy was under Education Law 310 or 2523—and this at a time when, in all likelihood, the statute of limitations already has run on these other remedies.

Finally, an analysis of the Feinberg Law and of Civil Service Law 12-a(c), as implemented, discloses that they unmistakably embody the doctrine of guilt by association, which doctrine has been condemned by the United States

Supreme Court (Schneiderman v. United States, 320 U. S., 118, 136).

As previously indicated the Feinberg Law is an administrative statute that provides machinery for the enforcement of Civil Service Law 12-a, the latter being substantive in nature. Section 12-a defines the offense—the Feinberg Law provides how its commission may be estab- [fol. 64] lished.

The following are the offenses defined in section 12-a:

Subdivisions (a) and (b) disqualify teachers who personally advocate violent overthrow of the government by every conceivable form of utterance, oral or written. In short, they cover all forms of *personal* guilt. Consequently, subdivision (c), which disqualifies one who "becomes a member of any society" that advocates the proscribed doctrines, obviously adds another form of guilt—guilt through mere membership in a subversive organization even in the absence of personal guilt. Though personal non-guilt would thus be a defense to a charge made under subdivision (a) or (b), it would be no defense where the charge is mere membership under subdivision (c).

What does the Feinberg Law provide as to how a charge of membership in a subversive organization [under section 12-a(c)] shall be proved? It first directs the Board of Regents to promulgate a list of organizations which advocate the doctrines prohibited by section 12-a. It then provides that membership in "any such organization included in such listing" shall constitute prima facie evidence of disqualification. Disqualification for what offense? Obviously for membership in an organization that advocates violent overthrow of the government. But this offense [defined in section 12-a(c)] has only two elements—membership in an organization and advocacy by the organization of violent overthrow of the government. The first element, membership, must be established by direct proof. The second, advocacy by the organization of the proscribed doctrine, is established prima facie by the fact that the or- [fol. 65] ganization has been listed by the Board of Regents—the intention of the Legislature, of course, being to obviate the need for a protracted trial each time a teacher is accused of membership under section 12-a(c). The two together make out a complete case against the teacher.

Should the teacher defend, what defenses may he interpose? Only the same two that he could formerly interpose to a charge under section 12-a(c) alone—either his non-membership or the organization's non-advocacy of proscribed doctrines. For the offense with which he is charged, under Feinberg Law procedures, is still a violation of section 12-a(c)—membership in an organization that advocates violent overthrow of the government. Here, again, then, personal non-guilt is no defense since the charge is still mere membership even though the administrative procedure employed is that set out in the Feinberg Law. What this constitutes, of course, is the finding of guilt from mere association without proof of personal guilt.

That this may not be done under our law is clear.

In the court's charge to the jury in the case of United States v. Foster et al., which involved a prosecution under a comparable statute, Judge Medina said: "Under our system of law, guilt is purely personal and you may not find any of the defendants guilty merely by reason of the fact that he is a member of the Communist Party, no matter what you find were the principles and doctrines which were taught or advocated by that party." This has been the most recent reiteration of the established principle that: "Under our traditions beliefs are personal and not [fol. 66] a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles" (Schneiderman v. United States, 320 U. S., 118, 136; see also "Loyalty Tests and Guilt by Association," 61 Harv. L. Rev., 592, John Lord O'Brien).

The cumulative effect of the procedure as outlined then is this: At an "appropriate" hearing by the Board of Regents (an administrative body) an organization is found to advocate violent overthrow of the government; a member, as such, of the organization may not be present at this hearing; neither the organization nor a member can review this determination in the courts. A teacher thereafter is charged with membership. At his hearing he is confronted with two onerous presumptions which he must affirmatively meet—presumptions which make out an entire prima facie case against him. They are (1) a presumption of the organization's guilt, based on an administrative board's non-reviewable hearing and finding which was ex parte

and hearsay as to the teacher on trial; and (2) a presumption of continuance of past membership rebuttable only by showing its termination "in good faith." Then should he be found guilty and discharged, his rights on appeal are ambiguous and essentially inadequate. And the capstone of this jerry-built structure is the finding of guilt from mere membership, without any proof of personal guilt—the teacher's personal non-guilt in fact being irrelevant where the only charge is membership.

It does not appear to this court that these procedures add up to "those fundamental requirements of fairness which are of the essence of due process" (Morgan v. United [fol. 67] States, 304 U. S., 1, 19).

Consequently subdivision (c) of Civil Service Law 12-a (as implemented by the Feinberg Law), section 2 of Education Law 3022 (Feinberg Law) and the Regents' Rules promulgated thereunder are unconstitutional under the due process clause of the Fourteenth Amendment.

In so holding it may be observed that the foregoing determination in no way impairs the power of the Board of Regents, under the other adequate provisions of existing law, to promulgate and enforce reasonable rules and regulations designed to rid the school system of teachers found to be unfit.

In view of this determination, the motion to intervene is denied and the motion for a temporary injunction is not passed upon.

Judgment upon the pleadings is granted to plaintiffs to the extent indicated. Submit orders and judgment accordingly.

[fol. 68] Waiver of Certification Omitted

[fol. 69] Supreme Court of New York

Notice of Appeal to Court of Appeals

[Title Omitted]

Sir:

Please take notice that plaintiffs Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel

[fol. 70] Krieger, William Newman, Dave Tiger and Edith Tiger do hereby appeal to the Court of Appeals of the State of New York from the judgment entered herein in the office of the Clerk of the County of Kings on April 5, 1950 upon an order of the Appellate Division, Second Department entered in the office of the Clerk of said Appellate Division on March 27, 1950 denying said plaintiffs' motion for judgment on the pleadings, dismissing their complaint, and reversing a judgment of the Supreme Court, Kings County entered in the office of the Clerk of the County of Kings on December 21, 1949 adjudging (1) that subdivision c of section 12-a of the civil service law as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law; (2) that subdivision 2 of section 3022 of the education law added by the Feinberg Law, and (3) that section 254 of Chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law, are null, void and unconstitutional, and enjoining and restraining defendant from enforcing any of the provisions thereof, and the said plaintiffs appeal from each and every part of said judgment of the Appellate Division as well as from the whole thereof.

Dated, New York, May 11, 1950.

Yours, etc., Witt & Cammer, Attorneys for Plaintiffs, Office & P. O. Address, 9 East 40th Street, Borough of Manhattan, City of New York.

[fol. 71] To: John P. McGrath, Esq., Corporation Counsel, Attorney for Defendant, Municipal Building, New York, New York; Francis J. Sinnott, Clerk of Kings County, Fulton and Joralemon Streets, Brooklyn, New York.

[fol. 72] In Supreme Court of New York, Appellate Division

Appellate Division Order of Reversal—March 27, 1950

[Title Omitted]

The above named The Board of Education of the City of New York, the defendant in this action, having ap-

pealed to the Appellate Division of the Supreme Court [fol. 73] from so much of a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 21st day of December, 1949, adjudging and decreeing (1) that subdivision c of section 12a of the Civil Service Law, as implemented by chapter 360, Laws of 1949, known as the Feinberg Law, (2) that subdivision 2 of section 3022 of the Education Law, added by the Feinberg Law and (3) that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law are null, void and unconstitutional, and enjoining and restraining The Board of Education of the City of New York from enforcing any of the provisions thereof, which judgment was entered pursuant to an order of said Court dated December 16th, 1949, granting as to plaintiffs-respondents a motion for judgment on the pleadings under Rule 112, Rules of Civil Practice, herein, and the said appeal having been argued by Mr. Michael A. Castaldi, Assistant Corporation Counsel, of Counsel for appellant, and argued by Mr. Harold I. Cammer of Counsel for plaintiffs-respondents, and submitted by Mr. John P. Walsh of Counsel for Kings County Committee of the American Legion, as amicus curiae, and submitted by Mr. R. Lawrence Siegel and others, of Counsel for Association of Teachers of the Social Studies in the City of New York, as amicus curiae, and submitted by Mr. Paul O'Dwyer and others, of Counsel for New York City Chapter of the National Lawyers Guild, as amicus curiae, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

[fol. 74] It is Ordered and Adjudged that the judgment insofar as appealed from be and the same hereby is unanimously reversed on the law, with $10. costs and disbursements, the motion for judgment on the pleadings denied, with $10. costs, and the complaint dismissed, under Rule 112, Rules of Civil Practice, with costs.

Enter: John J. Callahan, Clerk.

SUPREME COURT OF NEW YORK

JUDGMENT OF REVERSAL APPEALED FROM

The defendant-appellant having appealed to the Appellate Division of the Supreme Court, Second Department, [fol. 75] from so much of the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949 adjudging and decreeing (1) that subdivision c of section 12a of the Civil Service Law, as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law, (2) that subdivision 2 of section 3022 of the Education Law, added by the Feinberg Law and (3) that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law are null, void and unconstitutional, and enjoining and restraining The Board of Education of the City of New York from enforcing any of the provisions thereof, which judgment was entered pursuant to an order entered herein on or about the 16th day of December, 1949 granting as to plaintiffs-respondents a motion for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and the appeal having been duly argued at the Appellate Division and that Court in an order entered in the office of the Clerk of said Appellate Division on or about the 27th day of March, 1950 having ordered and adjudged that the judgment in so far as appealed from be unanimously reversed on the law, with $10 costs and disbursements, the motion for judgment on the pleadings denied, with $10 costs, and the complaint dismissed, under Rule 112 of the Rules of Civil Practice, with costs, and the costs of the defendant-appellant having been duly taxed at the sum of $364.06,

Now, on motion of John P. McGrath, Corporation Counsel, attorney for defendant-appellant, it is

[fol. 76] Adjudged that the judgment in so far as appealed from be and the same hereby is reversed on the law and the motion for judgment on the pleadings denied, and it is further

Adjudged that the complaint be and the same hereby is dismissed, and it is further

Adjudged that the defendant-appellant The Board of Education of the City of New York (110 Livingston Street,

Brooklyn, N. Y.) recover of the plaintiffs-respondents, Irving Adler, George Friedlander, Mark Friedlander, Martha Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger (Address—see below) the sum of $364.06, costs as taxed and that said defendant-appellant have execution therefor.

Dated, April 5th, 1950.

Francis J. Sinnott, Clerk.

Adler—36-12 Corporal Kennedy Drive, Bayside, Queens.
Geo. Friedlander
Mark Friedlander—43-03 Skillman Ave. L. I. City.
Spencer—31-40 76th Street, Jackson Hghts, Queens.
Krieger—96-18 72nd Ave., Forest Hills, Queens.
Newman—4422 Bedford Ave., Bklyn.
Dave Tiger
Edith—233 Exeter St., Bklyn.

[fol. 77] Supreme Court of New York, Appellate Division—Second Judicial Department

Opinion of Appellate Division

[Title Omitted]

Appeal from so much of a judgment of the Supreme Court reported in 276 App. Div. 527, entered December 21, 1949, in Kings County, in accordance with an order of the court at Special Term, which granted a motion as to certain plaintiffs, under Rule 112, Rules of Civil Practice, for judgment on the pleadings, declaring section 12-a, subdivision (c), Civil Service Law, as implemented by Laws of 1949, chapter 360, and section 3022, subdivision 2, Education Law, and chapter XV-B, section 254, of the Rules of [fol. 78] the Board of Regents, to be unconstitutional, and granted other relief.

John P. McGrath, Corporation Counsel (Seymour B. Quel, Michael A. Castaldi and Morris Weissberg with him on the brief), for appellant. Harold I. Cammer for respondents. John P. Walsh and others for Kings County Committee of the American Legion, amicus curiae. Paul O'Dwyer and

others for New York City Chapter of the National Lawyers Guild, amicus curiae. Arthur C. Buck and others for Association of Teachers of the Social Studies in the City of New York, amicus curiae. R. Lawrence Siegel and others for American Civil Liberties Union, amicus curiae.

CARSWELL, *J.*:

We are required to pass upon the constitutionality of two statutes. One is section 12-a, subdivision (c), of the Civil Service Law, and the other is section 3022 of the Education Law (L. 1949, ch. 360), the so-called "Feinberg Law." The former bans organizing a society or group advocating the overthrow of the State or National government by force, as well as membership therein. The latter implements Civil Service Law, section 12-a, in respect of its enforcement and, *inter alia*, provides for the removal of [fol. 79] superintendents, teachers and employees in the educational system who continue as members of subversive organizations.

We may not pass upon the validity of administrative action thereunder or Regents' rules adopted pursuant thereto; such issues are not justiciable in this action.

The principles to which recourse must be had to resolve the contentions respecting the validity of the challenged statutes are elementary. The application of these principles does not present a novel or unique problem. These principles, and the reasoning vindicating them, have been the subject of prolix exposition in opinions without number. Consequently, after a thorough analysis of the arguments advanced and the cases invoked, both relevant and irrelevant, it will suffice merely to state our determinative conclusions on the pertinent or decisive contentions pressed upon us.

(1) The wisdom or unwisdom of the challenged statutes and the propriety of their enactment presents a legislative and not a judicial problem.

(2) The offenses defined in section 12-a, Civil Service Law, are crimes under section 161, Penal Law, and Title 18, United States Code, section 2385. These latter enactments have been held to be constitutional. (*Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357;

Dunne v. United States, 138 F. 2d 137, certiorari denied 320 U. S. 790.) Hence, section 12-a, subdivision (c), Civil Service Law, is valid.

It is patently within the power of the Legislature, to promote the general welfare and protect the public service, to provide, as a reasonable condition governing public em- [fol. 80] ployment, that upon the commission of certain offenses described in section 12-a, Civil Service Law, public employment shall be discontinued. A constitutional right of free speech may be abridged as a condition to the enjoyment of public employment. One does not have a constitutional right to be a public employee except upon compliance with reasonable conditions imposed upon all, or imposed under reasonable classifications. (*United Public Workers* v. *Mitchell*, 330 U. S. 75; *McAuliffe v. New Bedford*, 155 Mass. 216; *People ex rel. Clifford v. Scannell*, 74 App. Div. 406, affd. on opinion below, 173 N. Y. 606; *Friedman v. Schwellenbach*, 159 F. 2d 22, certiorari denied 330 U. S. 838; *Washington* v. *Clark*, 84 Fed. Supp. 964; *Pawell* v. *Unemployment Compensation Bd. of Review*, 146 Pa. Superior Ct. 147; *Matter of Rabouine* v. *McNamara*, 275 App. Div. 1052; *People* v. *American Socialist Society*, 202 App. Div. 640). The condition here imposed and the classification made are reasonable.

(3) A finding pursuant to the statute (§ 3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under section 3022, subdivision 2, Education Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member-employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, more- [fol. 81] over, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy. The disqualification referred to in section 12-a, subdivision (c), in re-

spect to membership by an employee in a described organization means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. (Civil Service Law, § 12-a, subd. d.) The statute is prospective in operation and conforms with due process of law. (*Morgan* v. *United States*, 304 U. S. 1, 15; *Tot* v. *United States*, 319 U. S. 463, 467; *Casey* v. *United States*, 276 U. S. 413, 418; *Manley* v. *Georgia*, 279 U. S. 1, 6; *People* v. *Pieri*, 269 N. Y. 315, 324; *People ex rel. Beardsley* v. *Barber*, 266 App. Div. 371, affd. 293 N. Y. 706.)

(4) The contention that the statute (L. 1949, ch. 360; Education Law, § 3022) is a bill of attainder and, therefore, invalid, is without merit. It is predicated upon language in the preamble thereto and not contained in the statute. It is unsound and irrelevant to an inquiry as to the validity of the statute. It is long settled doctrine that such a preamble is not part of a statute. Recourse to a preamble is permissible only when ambiguity is to be resolved, or statutory language interpreted. (*Neumann* v. *City of New York*, 137 App. Div. 55, 59; *Westchester County S. P. C. A.* v. *Mengel*, 266 App. Div. 151, 155, affd. 292 N. Y. 121; *Pumpelly* v. *Village of Owego*, 45 How. Pr. 219; *Goodell* v. *Jackson*, 20 Johns. 693, 722.)

[fol. 82] Irrespective of references in the preamble to the Communist Party and its affiliated organizations, section 3022, Educational Law, provides for a finding, after a hearing on notice, as to all organizations. The provisions of the statute and not the references in the preamble are determinative.

The challenged statutes are constitutional.

(5) The validity of the rule of the Board of Regents need not be considered. No list has as yet been published, and any rule may be withdrawn and substituted prior to its practical application. Administrative procedure will be reviewed only at the instance of a person allegedly aggrieved thereby. (*Bandini Co.* v. *Superior Court*, 284 U. S. 8, 22; *Town of Pierrepont* v. *Loveless*, 72 N. Y. 211, 216.)

(6) The allegations in the complaint with respect to proposed expenditures by the defendant are expressly denied

in the answer. This issue of fact precludes the granting of a judgment on the pleadings in favor of the plaintiffs.

The judgment, in so far as appealed from should be reversed on the law, with $10 costs and disbursements, the motion for judgment on the pleadings denied, with $10 costs, and the complaint dismissed, under Rule 112, Rules of Civil Practice, with costs.

[fol. 83] Stipulation Waiving Certification of Record to the Court of Appeals Omitted

[fol. 84] In Court of Appeals of New York

Robert Thompson, as Chairman of the Communist Party of the State of New York, et al., *Appellants*,

v.

William J. Wallin et al., Constituting the Board of Regents of the University of the State of New York, *Respondents*

In the Matter of Charles L'Hommedieu et al., Appellants, against Board of Regents of the University of the State of New York et al., Respondents

Abraham Lederman, as President of Teachers Union of the City of New York, Local 555 of the United Public Workers, et al., Plaintiffs, and Irving Adler et al., Appellants, *v.* Board of Education of the City of New York, Respondent

Opinion—November 30, 1950

Appeal, in the first above-entitled action, from a judgment in favor of defendants, entered March 15, 1950, upon [fol. 85] an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Albany County upon an order of the court at Special Term (Shirick, J.; opinion 196 Misc. 686, granting a motion by plaintiffs for judgment on the pleadings declaring unconstitutional chapter 360 of the Laws of 1949 (2) declared said statute to be constitutional in all respects, and directed a dismissal of the complaint.

Appeal, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1950, which reversed, on the law, an order of the Supreme Court

at Special Term (Shirick, J.; opinion 196 Misc. 686), entered in Albany County, in a proceeding under article 78 of the Civil Practice Act granting a motion by petitioners for an order directing respondents, constituting the Board of Regents and others, from taking any action pursuant to chapter 360 of the Laws of 1949 and declaring said statute to be unconstitutional. The order of the Appellate Division directed a dismissal of the petition.

Appeal, in the third above-entitled action from a judgment in favor of defendant, entered April 5, 1950, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs-appellants, entered in Kings County upon an order of the court at Special Term (Hearn, J.; Opinion 196 Misc. 873) granting a motion by said plaintiffs for judgment on the pleadings under rule 112 of the Rules of Civil Practice (A) declaring unconstitutional subdivision (c) of section 12-a of the Civil Service Law, as implemented by chapter 360 of the Laws of 1949, and subdivision 2 of section 3022 of the Education Law, and section 254 of chapter XV-B of the Rules of the Board of Regents, and (B) restrained respondent board from enforcing said statutes and rule. The Appellate Division denied plaintiffs' motion for judgment on the pleadings and dismissed the complaint.

Abraham Unger, Osmond K. Fraenkel, David M. Freedman and Bernard Jaffe for appellants in first above-entitled action. Samuel M. Birnbaum [fol. 86] and Solomon Kreitman for American Legion Department of New York, amicus curiae, in support of respondents' position in first above-entitled action. Frederic A. Johnson, Osmond K. Fraenkel, Fred G. Moritt and Morris Eisenstein for Appellants in second above-entitled proceeding. Nathaniel L. Goldstein, Attorney-General (Wendell P. Brown and Ruth Kessler Toch of Counsel) for Respondents in second above-entitled proceeding. Arthur Garfield Hays and Osmond K. Fraenkel for Appellants in third above-entitled action. John P. McGrath, Corporation Counsel (Michael A. Castaldi, Seymour B. Quel and Morris Weissberg of counsel), for respondent in third above-entitled action.

LEWIS, J. An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Education Law (L. 1949, ch. 360) commonly known, and hereinafter referred to as the Feinberg Law.*

[fol. 87] At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed throughout the broad field of State civil service. Thus we find that by the Laws of 1917, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

"§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or

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* The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

Thompson et al. v. *Wallin et al.* (276 App. Div. 463) is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the Feinberg Law unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs (196 Misc. 686). At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute constitutional.

Matter of L'Hommedieu et al. v. *Board of Regents et al.* (276 App. Div. 494) is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing, the defendants, Board of Regents and others "to disregard Chapter 360 of the Laws of 1949

the doing of any treasonable or seditious act or acts while holding such position."

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

"12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word [fol. 88] of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political

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[Feinberg Law], and to cease and desist from taking any steps toward the enforcement of the provisions of said law * * * and to treat said enactment as a nullity * * *." At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted (196 Misc. 686). At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

Lederman v. *Board of Education of City of New York* (276 App. Div. 527) is an action by Teachers Union, Local 555 of the United Public Workers, and others, in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings (196 Misc. 873). At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature—which prefaces the three operative sections of the statute—is declaratory of conditions found by the Legislature which prompted the enactment:

"Section 1. The legislature hereby finds and declares that [fol. 89] there is common report that members of the subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state.

This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace [fol. 90] and to report thereon regularly to the state legislature."*

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* Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360, added to the Education Law as section 3022, provides as follows:

"§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar [fol. 91] listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purpose of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute

prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. * * *"

In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. (*American Communications Assn. v. Douds*, 339 U. S. 382, 400-401; *People v. Nebbia*, 262 N. Y. 259, 271.) Within those limits we examine the challenged law to determine whether, as claimed by the appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents—after inquiry, notice and hearing—shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for the appointment or retention in the service of the public school system.

In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to implement section 12-a of the Civil Service Law (quoted *supra*) [fol. 92] —an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State —the education of its children. (N. Y. Const., art. XI, § 1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he

serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher, or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system. (See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *American* [fol. 93] *Communications Assn.* v. *Douds*, *supra*, p. 405; *New York ex rel. Bryant* v. *Zimmermann*, 278 U. S. 63, 72-73; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Hawker* v. *New York*, 170 U. S. 189, 192-197.) Those cases stand for the legal principle which prompted Judge Holmes—as he then was—to write in *McAuliffe* v. *Mayor of New Bedford* (155 Mass. 216, 220), the familiar statement: "The petitioner may have a constitutional right to talk politics, but he has no consti--tional right to be a policeman."

Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the Feinberg Law, is incompatible with freedoms

guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preservation. We are also aware that those freedoms do not sanction unbridled license. (*People* v. *Gitlow*, 234 N. Y. 132, 137, affd. *sub nom. Gitlow* v. *New York*, 268 U. S. 652-666-667; *Schenck* v. *United States*, 249 U. S. 47, 52.) Indeed "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." (*American Communications Assn.* v. *Douds, et al. supra*, p. 394.) When *People* v. *Gitlow* (*supra*), reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry (pp. 666-668):

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents [fol. 94] the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by this Court in the *Fox Case* [236 U. S. 273], that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case* [254 U. S. 325], that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and *threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press,* said Story (*supra*) *does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. * * * It does not protect publications prompting the overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. * * * And *a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. * * * In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.*" (Emphasis supplied.) (See, also, *Cox* v. *New Hampshire*, 312 U. S. 569, 674; *Gilbert* v. *Minnesota*, 254 U. S. 325, 332, 339; *Schenck* v. *United States*, *supra*, p. 52; *Fox* v. *Washington*, 236 U. S. [fol. 95] 273, 276-277; *Patterson* v. *Colorado*, 205 U. S. 454, 462; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 294; *Robertson* v. *Baldwin*, 165 U. S. 275, 281; *People* v. *Most*, 171 N. Y. 423, 431.)

In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which threatened the well-being of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislature has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler* v. *Kansas*, 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unrea-

sonable attempt to exercise the authority vested in the State in the public interest." (*Whitney* v. *California*, 274 U. S. 357, 371.) Paraphrasing what was written in *Gitlow* v. *New York* (268 U. S. 652, 669, *supra*), we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * *; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Whether that danger was "clear and present"—within the rule of *Schenck* v. *United States* (*supra*, p. 52) as interpreted and applied in *American Communications Assn.* v. *Douds* (*supra*, pp. 393-400)—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years by those who [fol. 96] teach them and to whom the children look for guidance, authority and leadership; and that members of such groups frequently use their office or position to advocate and teach subversive doctrines.

Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be dis-

seminated among children in attendance at the public schools.

A bill of attainder has been defined as "* * * a legislative act which inflicts punishment without a judicial trial." (*Cummings* v. *Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly* v. *Village of Owego*, 45 How. Prac. 219, 257.) Furthermore, a textual examination of the provisions of the Feinberg Law — section 3022 — in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subver- [fol. 97] sive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (Cf. *American Communications Assn.* v. *Douds, supra*, pp. 413-414.) In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise,

teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "after inquiry, and after such notice and hearing as may be appropriate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in any organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute prima facie evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the con- [fol. 98] trary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification", as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion

the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

LOUGHRAN, Ch. J., CONWAY, DESMOND, DYE, FULD and FROESSEL, JJ., concur.

Judgment accordingly.

[fol. 99] IN COURT OF APPEALS OF NEW YORK

[fol. 100] ABRAHAM LEDERMAN, as President &c., & ors., Plaintiffs,

IRVING ADLER & ors. Appellants,

a'gst.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent

REMITTITUR—December 1, 1950

Be it remembered, That on the 28th day of September in the year of our Lord one thousand nine hundred and fifty, Irving Adler & ors., the appellants in this cause, came here unto the Court of Appeals, by Witt & Cammer, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Board of Education of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by John P. McGrath, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Arthur G. Hayes and Osmond K.

Fraenkel, of counsel for the appellants, and by Mr. Michael A. Castaldi, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court [fol. 101] appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

(sgd) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] IN SUPREME COURT OF NEW YORK

[Title Omitted]

ORDER—December 13, 1950

The plaintiffs-appellants having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, Second Department, entered herein in the office of the Clerk of said Appellate Division on or about the 27th day of March, 1950, reversing the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949 adjudging (1) that subdivision (c) of § 12-a of the Civil Service Law as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law; (2) that subdivision (2) of § 3022

of the Education Law added by the Feinberg Law; and [fol. 103] (3) that § 254 of Chapter XV-b of the Rules of the Board of Regents, adopted July 15, 1949 pursuant to the Feinberg Law are nulled, voided and unconstitutional, and enjoining and restraining the defendant-respondent from enforcing any of the provisions thereof and denying plaintiffs-appellants' motion for judgment on the pleadings and dismissing the complaint; and the appeal having been duly argued at the Court of Appeals and that Court in an order dated the 30th day of November, 1950 having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from be affirmed with costs; and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court there to be proceeded upon according to law;

Now upon reading and filing the remittitur from the Court of Appeals and on motion of John P. McGrath, Corporation Counsel, attorney for defendant-respondent, it is

Ordered that the order and judgment of the Court of Appeals be and the same hereby is made the order and judgment of this Court.

Enter, C. E. M., J. S. C.

Granted Dec. 13, 1950, Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 104] Supreme Court of the State of New York, County of Kings

Abraham Lederman as President of Teachers Union of The City of New York, Local 555 of the United Public Workers, and others, Plaintiffs,

Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, Plaintiffs-Appellants,

against

The Board of Education of the City of New York, Defendant-Respondent

Judgment—Filed December 22, 1950

The plaintiffs-appellants having appealed to the Court of Appeals from the judgment of the Appellate Division

of the Supreme Court, Second Department, entered herein in the office of the Clerk of said Appellate Division on or about the 27th day of March, 1950, which judgment reversed the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949, adjudging (1) that subdivision (c) of § 12-a of the Civil Service Law as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law; (2) that subdivision (2) of § 3022 of the Education Law added by the Feinberg Law; and (3) that § 254 of Chapter XV-b of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law are null, voided and unconstitutional, and enjoining and restraining the defendant-[fol. 105] respondent from enforcing any of the provisions thereof and denying plaintiffs-appellants' motion for judgment on the pleadings and dismissing the complaint; and the appeal having been duly argued at the Court of Appeals and that court in an order dated the 30th day of November, 1950, having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and an order having been duly entered in the office of the Clerk of the County of Kings on or about the 13th day of December, 1950, making the order of the Court of Appeals the order of the Supreme Court, and the costs of the defendant-respondent having been duly taxed at the sum of $268.43.

Now, on motion of John P. McGrath, Corporation Counsel, attorney for defendant-respondent, it is

Adjudged that the judgment so appealed from be and the same hereby is affirmed, and it is further

Adjudged that the defendant-respondent, The Board of Education of the City of New York (110 Livingston Street, Borough of Brooklyn, New York City) recover of the plaintiffs-appellants Irving Adler (3812 Corporal Kennedy Drive, Bayside, Borough of Queens, New York City), George Friedlander and Mark Friedlander (43-03 Skillman Avenue, Long Island City, Borough of Queens, New York City), Marta Spencer (31-40 76th Street, Jackson Heights, Borough of Queens, New York City), Samuel Krieger (96-[fol. 106] 18 72nd Avenue, Forest Hills, Borough of Queens, New York City), William Newman (4422 Bedford Avenue, Borough of Brooklyn, New York City), Dave

Tiger and Edith Tiger (233 Exeter Street, Borough of Brooklyn, New York City), the sum of $268.43 Dollars, costs as taxed, and that said defendant-respondent have execution therefor.

Dated, December 22nd, 1950.

Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

Notice and service omitted.

[fol. 107] In Court of Appeals of New York

[Title Omitted]

Order Allowing Appeal—January 17, 1951

It appearing to this Court that Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger have filed their petition for appeal to the United States Supreme Court and have filed therewith their assignment of errors as well as their statement as to the jurisdiction of said Court as required by Rule 12 thereof disclosing that said Court has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York rendered on November 30, 1950 affirming the dismissal of their complaint, it is

Ordered that the appeal prayed for be and the same hereby is allowed and granted to the Supreme Court of the United States from the judgment of the Court of Appeals of the State of New York rendered November 30, 1950 affirming the dismissal of plaintiffs' complaint by the Supreme Court of the State of New York, and that said appellants give a bond with good and sufficient security in the sum of $250.00 that they as appellants shall prosecute their appeal to effect and also pay damages and costs [fol. 108] if they fail to make their appeal good.

Dated: January 17th, 1951.

John T. Loughran, Chief Judge of the Court of Appeals.

[fol. 109] IN COURT OF APPEALS OF NEW YORK

[Title Omitted]

PETITION FOR ALLOWANCE OF APPEAL

To the Hon. John T. Loughran, Chief Judge of the Court of Appeals:

Appellants, Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, feeling aggrieved by the judgment of the Court of Appeals of the State of New York rendered November 30, 1950, affirming the dismissal of their complaint for the reasons set forth in their Assignment of Errors included herein pursuant to Rule 36, Paragraph 1, of the Rules of the Supreme Court of the United States, respectfully pray that an appeal be allowed to the Supreme Court of the United States from the judgment of the Court of Appeals pursuant to the provisions of Section 1257 of Title 28 of the United States Code.

Pursuant to Rule 12 of the Rules of the United States Supreme Court, appellants present with this petition a separate typewritten statement particularly discussing the basis on which they claim the Supreme Court of the United [fol. 110] States has jurisdiction to review the judgment in question.

Statement

This case is one in which is drawn into question the validity of Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law of the State of New York, commonly known as the Feinberg Law, on the ground that on its face and as construed by the Court of Appeals of New York said statute is repugnant to the Fourteenth Amendment to the Constitution of the United States, the decision of said Court of Appeals being in favor of the validity of such section as so construed.

Therefore, in accordance with Rule 36, Paragraph 1, of the Rules of the Supreme Court of the United States and Section 1257, Title 28, of the United States Code, appellants respectfully show the case is one in which a review may be had in the Supreme Court on appeal as a matter of right, and accordingly pray that such appeal be allowed

and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Assignment of Errors

Appellants in the above case together with the foregoing petition for allowance of appeal to the Supreme Court of the United States file herewith the following assignment of errors which they allege were committed by the Court of Appeals of New York in its judgment affirming the dismissal of their complaint:

[fol. 111] 1. The Court of Appeals erred in holding that the Laws of 1949, Chapter 360, being Section 3022 of the Education Law of the State of New York, is constitutional and valid on its face and in refusing to hold that it abridges freedom of speech and of assembly guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Court of Appeals erred in holding that the Laws of 1949, Chapter 360, being Section 3022 of the Education Law of the State of New York, is constitutional and valid on its face and in refusing to hold that it abridges due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals erred in affirming the dismissal of plaintiffs' complaint, which dismissal was based upon its construction of said section of the Education Law.

Wherefore appellants pray that the judgment of the Court of Appeals of November 30, 1950 affirming the judgment of the Supreme Court of the State of New York dismissing plaintiffs' complaint be reversed.

Dated: January 11th, 1951.

Respectfully submitted, Arthur Garfield Hays, Attorney for Appellants.

[fol. 112] Citation in usual form showing service on John P. McGrath omitted in printing.

[fols. 113-114] Praecipe omitted.

[fol. 115] Bond on Appeal for $250.00 omitted in printing.

[fol. 116] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed

February 15, 1951

To The Clerk of the United States Supreme Court:

Please take notice that appellants intend to rely upon the following points and designate the entire record as necessary for their consideration:

1. Section 3022 of the Education Law of the State of New York as enacted by Laws of 1949, Chapter 360, is unconstitutional in that it abridges freedom of speech and of assembly as guaranteed by the Fourteenth Amendment to the Constitution of the United States.
2. Section 3022 of the Education Law of the State of New York as enacted by Laws of 1949, Chapter 360, is unconstitutional in that it abridges due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated: February 13, 1951.

Yours, etc., Arthur Garfield Hays, Attorney for Appellants, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

To: Corporation Counsel of the City of New York, Municipal Building, New York 7, N. Y.

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 541

ORDER NOTING PROBABLE JURISDICTION—June 4, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.